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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 217

JOHNNIEMAE PATTERSON TIETZ, *et al.*,

Appellants,

vs.

MICHAEL J. MARIENTHAL, *et al.*,

Appellees.

On Appeal From the District Court of Appeal of the State of California, Second Appellate District.

APPELLEES' MOTION TO DISMISS.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 1399

JOHNNIEMAE PATTERSON TIETZ, *et al.*,

Appellants,

vs.

MICHAEL J. MARIENTHAL, *et al.*,

Appellees.

On Appeal From the District Court of Appeal of the State of California, Second Appellate District.

APPELLEES' MOTION TO DISMISS.

Pursuant to subdivision 1(b) of Rule 16, Revised Rules of this Court, appellees move to dismiss the appeal on grounds therein specified, to-wit:

1. That the appeal does not present a substantial federal question;

2. That the judgment rests on an adequate non-federal basis;

3. That any federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

Statement of the Case.

The appeal is from the decision rendered by the District Court of Appeal of the State of California, Second Appellate District, on December 21, 1965, and reported as *Tietz v. Los Angeles Unified School District*, 238 Adv. Cal.App. 1028, 48 Cal.Rptr. 245. The California District Court denied appellants' petition for rehearing on January 6, 1966. The California Supreme Court unanimously denied appellants' petition for hearing by that court on February 16, 1966. Copy of the California District Court's decision appears as Appendix C to the Jurisdictional Statement. (JSA 3-13.)[1]

Appellant, Mrs. Tietz, was a public school teacher in a school of which Mr. Morey was principal and Mr. Marienthal was vice-principal, hereafter referred to as "principals". Claiming that these principals "within the scope of their duties" (JSA 6, fnt. 1) sought by threats concerning the caliber of her work as teacher-librarian to coerce her to transfer from said school and that this caused her mental distress with resultant physical injury, an action for damages therefor was instituted by her with her husband, Mr. Tietz, joining as plaintiff and seeking consequential damages on his part. Defendants (appellees) were public school agencies (Los Angeles Unified School District and Board of Education of the City of Los Angeles), the principals, and the latters' respective wives. (JSA 4-5 for full statement of facts and claims made by appellants' pleadings.)

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[1]The Jurisdictional Statement will be cited as "JS" and the appendix thereto as "JSA", respectively followed by appropriate page references.

A reading of appellants' Jurisdictional Statements may leave the misapprehension that appellant Mrs. Tietz had been wrongfully dismissed or discharged from her teaching position. She had never been dismissed or discharged. There was never any deprivation of any tenure or seniority right and the second amended complaint makes no claim to the contrary. Appellants' pleading claimed that defendant principals within the scope of their duties by threatening disciplinary action sought to coerce her to seek a transfer from the particular school and that this caused her mental distress resulting in physical injury for which appellants sought damages. She did not seek to be transferred; she was never transferred; and no change or impairment ever occurred in any tenure or seniority right possessed by her.

Demurrers of defendant public school agencies and said wives were sustained with leave to amend to appellants' original complaint and appellants' first amended complaint. Demurrers of these defendants to appellants' second amended complaint were sustained without leave to amend and judgment of dismissal was rendered. Demurrer of defendant principals to appellants' second amended complaint was sustained with leave to amend; appellants did not amend within the allotted time; and judgment of dismissal was rendered. (JSA 4.) Appellants appealed to the California District Court of Appeal from said judgments of dismissal. (Ibid.)

ARGUMENT.

I.

Lack of Substantial Federal Question; State Court Decision Predicated on Non-Federal Basis; No Federal Question Passed on by State Court Decision.

A reading of the decision of the California District Court (JSA 3-13) instantly reveals that no federal question was therein mentioned or considered or passed upon but that the decision was predicated solely upon a non-federal basis.[2] Appellants sought recovery of personal injury and consequential damages allegedly caused by asserted tortious act or conduct of appellee school principals in the scope of their duties and employment by appellee school agencies. The California District Court held that appellants had stated no cause against any of the appellees and affirmed the trial court's judgments of dismissal of the action, all on the basis of applicable California law and decisions. There can be no claim that appellants' asserted cause for said damages arose under or by virtue of any federal statute or rule or federal constitutional provision. It is simply an action for damages for alleged tort. Whether such action is countenanced under California law and decisions, is a question of state, not federal, concern. The decision rests entirely upon non-federal bases.

a. As to Appellee School Principals.

Contrary to any intimation or assertion contained in appellants' Jurisdictional Statement, the California District Court did not predicate its decision as to appellee

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[2]That appellants did not raise timely or properly any claimed federal question is the subject of discussion under the second and concluding main heading, *infra*, hereof.

school principals upon the basis of failure of appellants to file or present any claim as a prerequisite to suit. Affirmance of the judgment of dismissal insofar as concerns appellee school principals was based on the fact that they were the administrative executive officers of the school, responsible for the supervision and administration of the school, with total responsibility to manage all affairs of the school, including general control and supervision of all certified and classified employees assigned to serve in the school; that as such executive officers they are endowed with discretion in these respects inherently or by law made a part of their position as school principals; and that, if appellant teacher's work had been unsatisfactory, appellee school principals would be acting within the scope of their duties in taking her to task. (JSA 6 and 8.) It was held that, under established California decision (quoting from *Lipman v. Brisbane Elementary School Dist.* (1961), 55 Cal.2d 224, 229, [11 Cal. Rptr. 97, 359 P.2d 465]), there is no liability in California on the part of government officials for discretionary acts committed in the scope of their authority. Among that quoted from *Lipman* was (JSA 7):

> "'. . . While, as pointed out in the Muskopf case (*Muskopf v. Corning Hospital Dist.* (1961), 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457]), a governmental agent is personally liable for torts which he commits when acting in a ministerial capacity, a different situation exists with respect to discretionary conduct. Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that

their conduct was malicious. (*Hardy v. Vial,* 48 Cal.2d 577, 582-584 [311 P.2d 494]; *Coverstone v. Davies,* 38 Cal.2d 315, 322 [239 P.2d 876]; *White v. Towers,* 37 Cal.2d 727, 730-732 [235 P. 2d 209, 28 A.L.R.2d 636]; see *Barr v. Matteo,* 360 U.S. 564, 569, et seq. [79 S.Ct. 1335, 3 L.Ed. 2d 1434].) The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation. *(Hardy v. Vial,* 48 Cal.2d 577, 582-583 [311 P.2d 494].)'

"The court in the *Lipman* case points out: '[T]his rule applies not only to acts essential to the accomplishment of the main purposes for which the office was created but also to acts which, although only incidental and collateral, serve to promote those purposes. (*White v. Towers,* 37 Cal.2d 727, 733 [235 P.2d 209, 28 A.L.R.2d 636].)'. . ."

The doctrine of absolute immunity of governmental officials, such as appellee school principals, in the exercise of discretion in connection with and scope of their duties or employment, is firmly established as part of California law. (*Hardy v. Vail* (1957), 48 Cal.2d 577, 582-584, 311 P.2d 494.) On page 582 of *Hardy,* it was said: "The policy underlying the doctrine of absolute immunity is well stated by Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581, as follows:", the California Supreme Court then quoting from *Gregoire* including that which the California District Court here quoted in part from *Gregoire.* (JSA 8.) This

Court, referring to *Gregoire* and quoting extensively therefrom, stated that, "The matter has been admirably expressed by Judge Learned Hand:" (*Barr v. Matteo* (1959), 360 U.S. 564, 571-572, 79 S.Ct. 1335, 3 L.Ed. 2d 1434.)

The California District Court here applied California public policy, granting immunity from liability to governmental employees, positioned such as appellee principals, for discretionary acts or conduct in their supervisorial duties or functions.[8] Obviously, no federal question is involved therein and that court's decision thereon is predicated on a non-federal basis.

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[8]It is difficult to follow appellants' argument in their Jurisdictional Statement anent teacher-tenure status; statutory methods of disciplinary charges; and the like. Appellant teacher-librarian's qualifications and tenure rights as such teacher-librarian were not the same as appellee principals' because the latter (to have been appointed to position of principal) were required to possess different and additional qualifications. (Cal. Education Code, §§13274, 13278.) Her tenure status or rights did not invest her with tenure or rights in any particular school, class or room. (*Matthews v. Board of Education* (1962), 198 Cal.App.2d 748, 754 [5], 18 Cal.Rptr. 101, "The assignment of teachers to classes for which a teacher is certified is entirely within the discretion of the governing board. A teacher does not acquire tenure in a particular class or room. She is assigned to duty within the scope of her certification wherever she is needed in the schools of the district. [Citations.]"; *Mitchell v. Board of Trustees* (1935), 5 Cal.App.2d 64, 69, 42 P. 2d 397, "A teacher, in acquiring a permanent status, does not thereby acquire a vested right to teach in any certain class or in any certain school."; see also *Abraham v. Sims* (1935), 2 Cal.2d 698, 711 [3], 42 P.2d 1029.) By transferring to another school within the district she would not and could not lose any seniority or tenure right. As part of their control and supervision over teachers assigned in the school (JSA 6), it patently was within the duties of the employment of appellee principals for the latter to take teachers in the school to task for unsatisfactory work (JSA 8) and their request that she seek a transfer to another school, if she acceded thereto, would not have caused any change whatever in her tenure status. It further

b. As to Appellee Wives.

The Jurisdictional Statement makes no claim that the California District Court erred in affirming the judgment of dismissal as to appellee wives. As stated in the California District Court's opinion (JSA 12):

> ". . . Appellants' sole ground for joining them in this action is that they 'did * * * aid, abet and conspire with said defendant principal and vice-principal in their aforesaid acts and plans * * *.'
>
> . . .
>
> "In the present case, no right of action is stated against the actual perpetrators of the alleged wrong, and no facts are pleaded showing any direct action by the conspirators. As it appears from the complaint, the only conduct of the wives which would subject them to liability is that they aided, abetted and conspired, in some mysterious way, with their husbands in order to harm the appellants. If no cause of action is stated against the husbands, it seems only too obvious that the mere act of conspiracy, without more, would not be actionable against the wives . . ."

Clearly, no federal question arises or exists thereunder and the California District Court's decision thereon is predicated on a non-federal basis.

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was the principal's province to report, in their discretion any unsatisfactory or other dereliction in work of teachers in the school—for disciplinary or such other action as might be taken in connection therewith. The arguments of appellants in their Jurisdictional Statement are contrary to and unsupported by California law in the foregoing respects and serve but to confuse. They do not establish any right of action against appellee principals in view of the public policy of California granting immunity to such officials under the rules of law discussed and followed in the California District Court's decision.

c. As to Appellee School Agencies.

In California, the appellee school agencies are state agencies, political subdivisions of the state designed for the promotion of the general educational purposes of the state. (*Kennedy v. Miller* (1893), 97 Cal. 429, 432, 32 Pac. 558; *Skelly v. School Dist.* (1894), 103 Cal. 652, 658, 37 Pac. 643; *Esberg v. Badaracco* (1927), 202 Cal. 110, 115, 117, 259 Pac. 730; *Ward v. San Diego School Dist.* (1928), 203 Cal. 712, 715, 265 Pac. 821; *Kelso v. Board of Education* (1941), 42 Cal.App.2d 415, 109 P.2d 29; *Gould v. Richmond School Dist.* (1943), 58 Cal.App.2d 497, 502, 136 P.2d 864.) As expressed in 43 Cal.Jur.2d, Schools, §56, pp. 628-629:

> "Since the state discharges some of its governmental functions relating to education through school districts, such districts are state agencies. They are political subdivisions of the state designed for the promotion of the general educational purposes of the state. They are agencies of the state for the local operation of the state school system. They are independent and separate governmental agencies distinct from the counties and cities in which they are situated."

In California, the consent of the state for suit against it or its agencies or political subdivisions has attached to it as a prerequisite to suit the filing of a claim with the governmental body being sued. This requirement existed at the time of the alleged tort (Cal. Gov't Code, §710, Stats. 1959, ch. 1724) expressly continued in existence by Cal.Stats. 1961, ch. 1404, §4, and now found in substantially the same form in Cal. Government Code, section 945.4, Cal. Stats. 1963, Ch. 1715, §2. (See also Cal. Stats. 1963, ch. 1715, §152, sub. (b).)

Contrary to appellants' statement, the California statutes at all times have required the filing of such claim with the governmental agency where claim for money or damages is being made against such agency. There was no "retroactive" application of the requirement for filing of such claim with the appellee school agencies. That requirement at all times existed. (See, *Sobey v. Molony* (1940), 40 Cal. App. 2d 381, 385, 104 P. 2d 868; *Wayne v. Bureau of Private Investigations & Adjusters* (1962), 201 Cal. App. 2d 427, 439, 20 Cal. Rptr. 194; Anno. 77 A.L.R. 2d 336.)

In *Dias v. Eden Township Hospital Dist.* (1962), 57 Cal.2d 502, 503, 20 Cal.Rptr. 630, 370 P.2d 334, it was held: "There is no merit to plaintiffs' argument that our decision in *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457], in effect eliminated the requirement for presentation of claims as a condition to the maintenance of actions against public entities." It is established California law that, in an action against a public entity, presentment of a claim is required and failure to do so is fatal to the action (*Redlands High School Dist. v. Superior Court* (1942), 20 Cal.2d 348, 358, 125 P.2d 490, and cases cited), subjecting to general demurrer a complaint which fails to allege compliance with this requirement. (*Dias v. Eden Township Hospital Dist., supra,* 57 Cal.2d 502.) "Men must turn square corners when they deal with the government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with." (*Rock Island, Arkansas & Louisiana Railroad Co. v. United States* (1920), 254 U.S. 141, 142, 41 S.Ct. 55, 65 L.Ed. 188.)

Appellants profess to claim that California requires no filing of a claim where the tort is alleged to be in-

tentional. That was not the law at the time of the event (nor since) in an action for money or damages against a public entity. At all times pertinent to this cause, California has required, as a condition precedent to suit against a public entity, such as appellee school agencies, the filing of such a claim regardless of whether the tort be intentional or unintentional. The applicable statutes require such filing as to any suit "for money or damages" without exception or limitation. (See *Whitson v. LaPay* (1957), 153 Cal.App.2d 584, 588-589 [4][5], 315 P.2d 45, petition for hearing by California Supreme Court denied; *Farnsworth v. Cote* (1962), 199 Cal.App.2d 762, 769-770, 19 Cal.Rptr. 45.) Certainly, the interpretation and construction of the state statute in this respect is a matter of state not of federal, concern. Like comment applies to appellants' statement that California Labor Code, section 3601, and former California Government Code, section 703(d) (now Gov't Code, §905(d)), combine to exempt appellants from the prerequisite claims requirement. Section 703 (d), now 905(d), provided that statutory provisions relating to claims against local public entities "apply to all claims for money or damages against local public entities except: . . . (d) Claims for which the workmen's compensation authorized by Division 4 (commencing with Section 3201) of the Labor Code *is the exclusive remedy.*" (Italics added.) Under this exception relied on by appellants, it is only when workmen's compensation is the "exclusive remedy" that no claim is required to be presented under the California law. The only body having jurisdiction over workmen's compensation proceedings is the California Industrial Accident Commission. A suit for damages in the California Superior Court cannot and does not come with-

in the exception. The Superior Court has no jurisdiction to award workmen's compensation. (*Scott v. Industrial Acc. Com.* (1956), 46 Cal. 2d 76, 83, 293 P.2d 18.)

In the case at bench, the California District Court held (JSA 9-11) that California law required appellants to have presented a claim as a prerequisite to suing appellee school agencies; that this requirement, under applicable statutory provisions, applied whether the tort asserted was intentional or merely negligent, i.e., "The sections involved require the presentation of a claim 'for money or damages' which on its face includes actions for either negligence or intentional torts." (JSA 10); that appellants' reliance on the exception (where workmen's compensation "is the 'exclusive remedy' ") was erroneous and a misapprehension of the statutory exception; and the California District Court concluded its discussion with (JSA 11):

> "It is to be noted that the demurrer of the public school agencies to appellants' second amended complaint was sustained without leave to amend. This was not an abuse of discretion, however, since two prior complaints had been struck down on the ground that appellants failed to allege the required presentation of the claim. Obviously, appellants could not truthfully allege that they had complied with this prerequisite, and leave for further amendment would have been a fruitless gesture. [Citations.]"

The California District Court here applied established California law and decisions in holding that no recovery could be had against the state school entities in the absence of allegation that the requisite claim had

been presented or filed. Obviously, no federal question is involved therein and the District Court's decision thereon is predicated upon a non-federal basis.

II.
Appellants' Failure Timely or Properly to Raise Federal Question.

While the matters heretofore discussed amply support this motion to dismiss the appeal, another basis exists which here will be shown. Appellants failed timely or properly to raise any federal question.

On page 5 of their Jurisdictional Statement, appellants refer to paragraph VIII of their first count of the second amended complaint, which paragraph they assert raised their federal constitutional claims. They state that they "brought said allegation to the attention" of the California District Court in their Opening Brief, their Reply Brief, and their Petition for Rehearing, and of the California Supreme Court in their Petition for Hearing. With these statements, appellees disagree.

Paragraph VIII of said first count of appellants' second amended complaint was the subject of motion to strike as to part, a motion which was granted by the California Superior Court because the conclusionary allegations were insufficient to present properly any such claim. The allegation made was as follows (stricken part shown by cross-out):

> "That said plan and practice and acts were then (and theretofore had been) countenanced and concurred in by said defendant Board, and was subsequently ratified by said Board, ~~all in contravention of the laws and Constitution of the State of California and of the laws of the United States and of the Fourteenth Amendment to the United States~~

~~Constitution in respect to the vested rights of teachers under contract and with permanent tenure, and as respecting such rights of this plaintiff."~~

At no time on their appeal before the California District Court or in their petition for hearing to the California Supreme Court did appellants make any claim that there had been any error in striking this or any other portion of their pleadings. Even had the stricken portion remained, it is extremely doubtful that the vague reference made, simply to the Fourteenth Amendment to the United States Constitution, would suffice to support a claim of violation of any particular specific provision of that amendment. (*Herndon v. Georgia* (1935), 295 U.S. 441, 442-443, 55 S.Ct. 794, 79 L.Ed. 1530; *Superior Court of the State of California v. Evans* (1940), 309 U.S. 640, 60 S.Ct. 893, 84 L.Ed. 995.) Be this as it may, it is clear that appellants did not timely or properly present any federal question in or through their appeal before the California District Court or the California Supreme Court.

Under California appellate procedure, so far as here material, there are: (1) an Appellant's Opening Brief (Cal.Rules of Court, Rule 13), here filed by appellants; (2) a Respondent's Brief (Rule 14 (a)), here filed by appellees; (3) an Appellant's Reply Brief (Rule 14 (a)), here filed by appellants.[4] Oral argument is per-

[4]As to "Form of Briefs," Rule 15 requires:

"Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical 'assignments of errors' but should be concise headings which are generally descriptive of the subject matter covered. The statement of any matter in the record shall be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities."

mitted (Rule 22) and written decision thereafter is rendered by the appellate court. (Rule 24.) Petition for rehearing is allowed. (Rule 27.) If such be denied, when made as here was done by appellants, petition for hearing by the California Supreme Court is allowed. (Rule 28.) "On petition for hearing the Supreme Court will not examine the record for error, or inquire into the correctness of the facts stated in the [District Court's] opinion unless the petition shows: (1) . . .; or (2) that substantial legal issues raised in the briefs were not considered in the opinion, and that the failure to consider them was set forth in a petition for rehearing." (Rule 29 (b).)

Appellants filed a petition for hearing by the Supreme Court to which appellees filed an answer as permitted by Rule 28 (c).

In an authority cited and quoted by appellants in their Jurisdictional Statement (p. 28), it pertinently is stated (Stern & Gressman's "Supreme Court Practice" (3rd ed.); page 97):

> "But the fact that the federal question was properly raised before the trial court may not be enough. The question must also be pursued on appeal to higher state courts, assuming the state procedure so permits or requires. And it must be pursued in the manner and with the degree of specificity required by the state rules of practice. See *Beck v. Washington*, 369 U.S. 541, 549-554. 'Without any doubt it rests with each state to prescribe that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns

> entirely upon questions of local or general law.' *John v. Paullin,* 231 U.S. 583, 585. See also *Wolfe v. North Carolina,* 364 U.S. 177, 195; *C.I.O. v. McAdory,* 325 U.S. 472, 477; *Parker v. Illinois,* 333 U.S. 571; *General Union Tel. Co. v. Edwardsville,* 269 U.S. 190; *Chesapeake & Ohio R. Co. v. McDonald,* 214 U.S. 191; *Harding v. Illinois,* 196 U.S. 78. Only when such rules are applied as a pretense to avoid a federal constitutional issue or in a manner that discriminates against the assertion of federal claims will the Court ignore or override these state procedural requirements. See *Nickel v. Cole,* 256 U.S. 222, 225."

Appellants did not present or pursue any state or federal constitutional question in the manner permitted or required, under the aforesaid California appellate procedure, to the appellate courts of that state.

1. Appellants' Opening Brief: Appellants state that they "brought said allegation to the attention" of the California District Court on page 4 of their Opening Brief—referring to said paragraph VIII of their second amended complaint. The statement of facts of Appellants' Opening Brief covered pages 2-6 purporting to summarize the allegations of said complaint. On page 4 of their statement of facts, appellants stated: "The vested right by reason of tenure and contract in violation of the Constitution is alleged in paragraph VIII thereof." This is the sole reference made therein to any Constitution. Nowhere, in either the facts or in any discussion of legal points did appellants make any claim that either plaintiff had constitutional rights which were violated by the trial court's decision. No such point was advanced or presented in their Opening

Brief. Nowhere therein did either plaintiff cite or rely upon any Constitutional provision, either state of federal. No constitutional question was raised or discussed in the Opening Brief. Under established California decision, failure of an appellant to raise the legal issue as a point and make argument thereon in his opening brief is deemed a waiver or abandonment of the point. (*Atlas Terminals, Inc. v. Sokol* (1962), 203 Cal.App.2d 191, 209, 21 Cal.Rptr. 293, "The last point raised in appellant's opening brief is denial of due process of law. After asserting this, counsel devote no more attention to it, thus waiving the point." (hearing denied by California Supreme Court); *Bank of America v. Frost, infra* (1962), 205 Cal.App.2d 614, 619, 23 Cal. Rptr. 441; *Blackman v. Kristovich* (1963), 216 Cal. App.2d 792, 795, 31 Cal.Rptr. 413, "In her brief, appellant does not argue the first ground urged below. We may therefore assume that appellant has abandoned assertion of the question of duress. (*People v. Scott,* 24 Cal.2d 774, 783 [151 P.2d 517].)" (hearing denied by California Supreme Court); *Garter v. Metzdorf Associates* (1963), 217 Cal.App.2d 812, 822 [12], 32 Cal. Rptr. 113; *Hogan v. Miller* (1957), 153 Cal.App.2d 107, 117, 314 P.2d 230, "Plaintiff's final complaint is that the court erred in 'refusing to allow defendant Bale to testify whether or not he relied on defendant Martin to put in a window that would be safe.' Neither argument nor authority is offered in support of this point. Under such circumstances we are not called upon to consider it. (*Gray v. Walker,* 157 Cal. 381, 386 [108 P. 278]; *Estate of Volen,* 121 Cal.App.2d 161, 166 [262 P.2d 658].)" hearing denied by California Supreme Court.)

2. Respondents' Brief, filed by appellees, did not discuss or consider any constitutional question for the reason that none had been presented by the Appellants' Opening Brief.

3. Appellants' Reply Brief: Appellants state that they brought the allegation of paragraph VIII of their second amended complaint to the attention of the California District Court on page 5 of their said reply brief. (JS 5.) Their reply brief commenced discussion of *legal* points and issues on page 6. In the reply brief, pages 1-6, they discussed relationship of the parties and, as a subheading entitled "The Proximate Cause of Plaintiff School Teacher's Injury" (pp. 4-6), they stated (p. 5) that the complaint alleged that transfer to another school "would and did affect plaintiff as a threat to her tenure and seniority, in which she had a contractual and statutory right which amounts to a constitutionally vested right as alleged in the complaint. Paragraphs I and VIII of first cause of action." Nowhere in said reply brief did appellants advance any legal point or argument or cite authority which claimed any constitutional violation to have been committed. In fact, as was the case in regard to their Opening Brief, no citation or mention was made of any Constitutional provision, state or federal. Even had they done so, California appellate procedure does not require an appellate court to consider a point raised on appeal for the first time by way of the appellant's reply brief. (*People ex rel. Dept. Public Works v. Garden Grove Farms* (1965), 231 Cal.App.2d 666, 670, 42 Cal.Rptr. 118, "Generally, a contention raised for the first time in an appellant's closing brief requires no consideration and may be disregarded. [Citations.]", hearing denied

by California Supreme Court; *Bank of America v. Frost* (1962), 205 Cal.App.2d 614, 619, 23 Cal.Rptr. 441, "In the closing brief of William he raised for the first time as a point on appeal, the question of special findings requested by him but not made by the court. While this matter was related in the opening brief under the title 'History of Proceedings,' no complaint or contention was made about it in that brief. It may be disregarded by this court. [Citations.]"; *Newell v. Brawner* (1956), 140 Cal.App.2d 523, 527, 295 P.2d 460, "As a rule, points raised for the first time in a reply brief need not be considered by the court and in view of the inadequate presentation of the point we are not inclined to depart from the rule.", hearing denied by California Supreme Court; *Utz v. Aureguy* (1952), 109 Cal.App.2d 803, 807-808, 241 P.2d 639, discussion under "The Briefs on Appeal".)

4. California District Court's decision on appeal: Nowhere in the decision here rendered by the California District Court (JSA 3-13) is there any mention of any constitutional issue or question, either state or federal. The reason is simple. No such problem had been raised, discussed or considered in the briefs on appeal and no such question was before the appellate court. It was not required to consider or pass upon any such question under these circumstances and the authorities above cited.

5. Appellants' Petition for Rehearing: For the *first* and *only* time in any brief or petition filed by appellants in the California appellate courts (or responses filed by appellees), the appellants in their petition for rehearing by the California District Court made any

mention of any Constitution, state or federal.[5] Even then, appellants did not present any discussion or showing as to how or in what manner any constitutional right of appellants had been violated. (See footnote 5 herein.) Even had appellants adequately discussed or argued a constitutional question in the petition for rehearing, it then was belated and entitled to no consideration by the appellate court. It is an established California rule of appellate procedure that points not presented in the briefs will not be considered when presented in the petition for rehearing. (*People ex rel. Dept. of Public Works v. Mascotti* (1962), 206 Cal. App.2d 772, 779-780, 23 Cal.Rptr. 846, "The point must be deemed waived by failure to present it in the briefs. 'Counsel are not permitted to argue their cases in a piecemeal fashion and points not previously argued will not be considered where raised for the first time on petition for rehearing. (*Epperson v. Rosemond,* 100 Cal.App.2d 344, 348 [233 P.2d 655, 224 P.2d 480];

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[5]The only mention is contained in Point X of the Petition for Rehearing. This Point X was entitled, "Affirmance of the Judgment Sustaining the Demurrer Will be Denial of Due Process and Equal Protection of the Law." The *entire* discussion thereafter made in Point X was as follows: "This issue is raised in paragraph VIII of the first cause of action and incorporated by reference in the other causes of action of the complaint. As affecting tenure of teacher, see in addition to authorities cited in Opening Brief, p. 11, *Ahrensfeld v. State Board of Education,* 126 N.J.L. 543, 19 A.2d 656; As concerns seniority rights, *Texas & P. Ry. Co. v. Brotherhood of R. Trainmen,* 63 F.Supp. 640, 159 Fed.2d 822; As to right to work without coercive action: *Bautista v. Jones,* 25 Cal.2d 746, 155 Pac.2d 343; Constitution of California, Article I, §§ 1, 13, 21; Art. 4, §25; United States Constitution, Amendment 14. This court should not disregard this issue, especially in considering the next point below." The following Point XI was entitled, "In View of the Foregoing Points I to X, All Inclusive, Showing that the Grounds for the Decision Adverse to Appellants are each and all Untenable, the Judgment Sustaining the Demurrer is in Error and Should be Reversed." No constitutional claim was asserted or discussed in said Point XI.

4 Cal.Jur.2d Appeal and Error, §522, p. 365.)' (*Smith v. Crocker First Nat. Bank,* 152 Cal.App.2d 832, 837 [314 P.2d 237].) 'No such point was suggested in the argument on which the petitioners submitted the case for decision. It is the settled rule of this court that points made for the first time on petition for rehearing will not be considered.' (*A.F. Estabrook Co. v. Industrial Acc. Com.,* 177 Cal. 767, 771 [177 P. 848].)", petition for hearing by California Supreme Court denied; *Epperson v. Rosemond* (1950), 100 Cal.App.2d 344, 348, 223 P.2d 655, 224 P.2d 480, "Appellants in their petition for rehearing are now seeking to change their basis of attack on the judgment. 'Appellate courts cannot submit to piecemeal argument and will not consider on petition for rehearing questions not previously raised.' (*Bradley v. Bradley,* 94 Cal.App.2d 310, 312 [210 P.2d 537, 211 P.2d 638].)", petition for hearing by California Supreme Court denied.)

6. Appellants' Petition for Hearing by California Supreme Court: Nowhere in appellants' petition for hearing by the California Supreme Court was it claimed that appellants had advanced and that the California District Court had failed to pass upon any constitutional question or issue, either state or federal. (See *supra* Cal.Rules of Court, Rule 29 (b) and partial quotation thereof.) Nowhere in said petition for hearing was any reference made to any Constitution, state or federal, and nowhere was any argument advanced that any constitutional question or problem existed.[6] Cer-

[6]On page 5 of their Jurisdictional Statement, appellants state that they "brought said allegation [paragraph VIII of their second amended complaint] to the attention" of the California Supreme Court "in their petition to the California Supreme Court for Hearing (p. 7)." Appellees have searched in vain throughout the Petition for Hearing for any reference to either paragraph VIII or any constitutional problem. On page 7 of said

tainly, it cannot be successfully asserted that appellants thereby presented any constitutional problem to the California Supreme Court by their petition for hearing. (Cal.Rules of Court, Rule 29(b), supra. See also *Nemo v. Farrington* (1908), 7 Cal.App. 443, 451, 94 Pac. 874, opinion Supreme Court denying hearing; *Brown v. Coffee* (1911), 17 Cal.App. 381, 386, 121 Pac. 309, opinion Supreme Court denying hearing.)

Not only is it questionable whether appellants properly raised any constitutional question in the trial court, but it appears from the foregoing that appellants neither properly nor timely raised any such question on appeal before either the California District Court or the California Supreme Court.

Conclusion.

It is respectfully submitted that the appeal should be dismissed pursuant to Rule 16(1)(b) of the Revised Rules of this Court.

Dated: June 23, 1966.

HAROLD W. KENNEDY,
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VEATCH, THOMAS, CARLSON & DORSEY,
WAYNE VEATCH, and
HENRY F. WALKER,
Counsel for Appellees.

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petition, Point VIII was entitled, "Affirmance of the Judgment Sustaining the Demurrer Rests on Assumption of Facts not Pleaded and Which are Not Properly to be Taken into Consideration by Judicial Notice." The opening sentence thereafter was, "See Points X and XI of Appellants' Petition for Rehearing." The remainder of the discussion (pp. 7-8, Pet. for Hear.) consisted of the claim or argument whether any filing of a claim was required by California law under the facts alleged in the pleading. Nothing was advanced pertaining to any constitutional question, either state or federal.

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